IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RFA No.18 of 1999.

Judgement reserved on: 27.7.2007

Date of decision: 24.9.2007.

The Regional Engineering College Society & Ors…….Appellants

Vs.

A.B. Odak …. Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant : Mr. K.D. Sood, Advocate.

For the Respondent : Mr. Suneet Goel, Advocate.

Kuldip Singh, Judge.

The appellants-defendants are in appeal against judgment, decree dated 7.10.1998 passed by learned District Judge, Hamirpur in Civil Suit No.117 of 1993 (H.C)/06 of 1995 (RBT).

2. The brief facts of the case are that respondent filed a suit for declaration and permanent prohibitory injunction against appellants in this Court which was registered as CS No.117 of 1993 but later on the suit was transferred to learned District Judge, Hamirpur on 8.3.1995.

3. The further facts are that the respondent submitted his tender on 27.9.1990 for execution of work of construction of Girls Hostel for Regional Engineering College, Hamirpur (SH:- Building portion and internal WS & SI). The tender of respondent was

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Whether the reporters of the local papers may be allowed to see the Judgment?Yes

accepted by appellant No.2 on behalf of appellant No.1 vide letter dated 30.10.1990 and agreement No.7 of 1990-91 to this effect was executed between the parties. The construction work was to be completed within a period of two years to be reckoned from 15th day of the award. The work was to commence from 14.11.1990 and was to be completed on or before 13.11.1992. The respondent was required to maintain progress during the execution of the work and to complete 1/8th of the work in 1/4th of the stipulated time, 3/8th of the work in ½ of the stipulated time and 3/4th of the work in 3/4th of the stipulated time under the agreement. The two years time for completion of the work under the agreement was the essence of the contract. There was provision for extension of time. In case of delay in execution of the work, there was provision for levy of compensation on the contractor.

4. The work site was to be made available by the appellants to the respondent. The appellants were to supply materials to respondent under Clause 10 of the agreement. The work was to be executed in accordance with the designs, drawings and instructions issued by appellant No.2 to the respondent in terms of Clause 11 of the agreement. The respondent was entitled to regular monthly payments for all the work executed by him upto the previous month.

5. The appellants failed to honour their commitments under the agreement. There was implied obligation on the part of the appellants not to interfere with the work at the site and not to impede the progress of the work. The work for construction of four Blocks

numbered as Blocks No.1,II,III and IV was to commence immediately after the award of the work. The sites were not made available to the respondent by appellants so as to enable him to commence the work. The site for Block No.1 was handed over to respondent partly in February, 1991 and fully in August, 1991. The site for Block No.II which was occupied by trees and which required substantial cutting works was not made available to the respondent even at the time of institution of the suit . Even though the trees were cut and removed in January, 1992 but the stumps of the trees remained on the site and the work of earth cutting also remained to be executed by the appellants. The site for Block No.III was made available to the respondent in December, 1990. He started the work on the site by starting cutting work but he was stopped by appellants on the ground that work allotted to the respondent did not include cutting work. The tenders for cutting work were thereafter separately called by the appellants but the work was not awarded to any party and instead, the appellants started executing the items of earth cutting departmentally and the work continued upto the end of May, 1993 on hill side and filling work on the valley side was still continuing when the suit was filed and therefore, site for Block No.III was not made available to the respondent. On the same ground and in similar circumstances the site for Block No.IV was not handed over to the respondent to enable him to execute the work.

6. The respondent for aforesaid reasons was prevented from achieving the stipulated work progress under the agreement. The stipulated time for completion of the work was extended by

appellant No.2 one year upto 13.11.1993 vide letter dated 13.11.1992.

7. The appellant No.2 in order to absolve himself of any liability relating to delay in the execution of the work started issuing threatening notices to the respondent regarding his intention of imposing compensation for alleged delay in execution of the work. The respondent has alleged that all such notices were replied and the actual reasons for delay of the work were brought to the notice of the appellants. As per communication dated 17.8.1993 compensation at the rate of 5% amounting to Rs.4,22,548/- was imposed on respondent for alleged delay in execution of the work. It is the case of the respondent that compensation was imposed by appellant No.2 without affording him reasonable opportunity of being heard and thus the levy of compensation is illegal, void and contrary to the principles of natural justice.

8. The appellants contested the suit by filing joint written statement. They have admitted the award of work to the respondent. It has been submitted that the site was handed over to the respondent in time. Similarly, designs, drawings and instructions were also issued timely and as per progress of work and requirements at site supply of building materials was constantly maintained. The payments were made to the respondent as per time schedule despite the fact that the appellants failed to submit the bills in time.

9. The sites of Blocks No.1 & III were made available to the respondent immediately after award of work and he commenced the

execution during January, 1991, but the slab of this block was laid during March, 1992 after a lapse of 15 months which clearly indicates delay on the part of the respondent. The complete site was made available to the respondent during February/March, 1991 in respect of Block No.I. The site of Block No.II was made available to respondent during November/December, 1991, but he did not commence work on this block even till the time of filing of the written statement.

10. The sites of Blocks No.III & IV were also handed over to the respondent as per site requirements and capacity of the respondent and the work was never allowed to suffer. The excavation of columns of Block No.III was started by the respondent during April, 1991 and for Block No.IV during March, 1991. The respondent's plea that cutting work of Block No.III continued till May, 1993 is not relevant as the filling work was being carried out by appellant No.1 for development of the area of Girls Hostel.

11. The respondent failed to carry out the execution of work in accordance with terms and conditions of the agreement. It has been denied that delay in execution of work on the part of the respondent was attributable to appellants, rather delay was caused by the respondent. The respondent executed total work worth Rs.3,72,000/- in 12 months i.e. half of the stipulated time limit against the agreement amount of Rs.84,50,967/- which clearly indicates that he did not execute the proportionately to the time schedule and as per the provisions of the agreement. The extension in time was granted to the respondent upto 13.11.1993 on his request on the basis of justified hindrances experienced by him while executing the

work under the agreement. The compensation was imposed after due notice to the respondent. The respondent filed replication to the written statement in which he denied the case set up by the appellants and reiterated the stand taken by him in the plaint.

12. The learned District Judge decreed the suit of the respondent and restrained appellants No.1 to 3 from realizing the compensation of Rs.4,22,548/- from the respondent in any manner. The appellants are in appeal against impugned judgment, decree.

13. I have heard the learned counsel for the parties and gone through the record. The learned counsel for the appellants-appellants has submitted that the Court below has misinterpreted the material on record. The delay in execution of the work is attributable to the respondent. The compensation imposed under Clause 2 of the agreement on the respondent was justified. The learned counsel for the respondent has supported the impugned judgment, decree. He has submitted that the respondent could not execute the work in time due to various acts of omission and commission of appellants. The delay is not attributable to respondent. The compensation levied on the respondent was without jurisdiction.

14. The learned counsel for the parties have relied on Clause 2 of the agreement Ex.PB, the Clause 2 of the agreement is reproduced as follows:-

> *"The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor & shall be deemed to be the essence of the contract on the part of the contractor & shall be reckoned from the fifteenth day after the date on which order to commence the work is issued to the contractor. The work shall throughout the stipulated period of*

the contract be proceeded with all due diligence and the contractor shall pay as Compensation an amount equal to 1%, or such smaller amounts as the Superintendent Engineer (Whose decision in writing shall be final) may decide on the amount of the tendered amount of the whole work as shown in the tender, for very day that the work remains uncommenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month (save for special jobs to complete one eight of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; three-eight of the work before one-half of such time has elapsed, and three-fourth of the work, before three-fourth of such time as has elapsed. However, for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by Engineer-in-charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said tendered amount of the whole work for every day that the due quantity of work remains incomplete: Provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent, on the tendered amount of the work as shown in the tender".

The learned counsel for the appellants has submitted that under Clause 2 of the agreement, the appellants have rightly imposed compensation amounting to Rs.4,22,548/- vide letter dated 17.8.1993 Ex.PW-2/30. He has submitted that the respondent in first twelve months has executed total work worth Rs.3,72,000/- as against

agreement amount of Rs.84,50,967/-. The respondent did not achieve the various milestones fixed in the agreement. He was served notice Ex.PW-2/29 in which it was clearly pointed out that the progress of work remained very slow. The respondent did not improve the working and therefore compensation amounting to Rs.4,22,548/- was levied vide Ex.PW-2/30.

15. The learned counsel for the respondent has submitted that earlier Shri G.S. Juneja sole Arbitrator-cum-Superintending Engineer, 3rd Circle, HP PWD, Solan adjudicated the dispute pertaining to certain claims between the parties vide award dated 30.9.1996 Ex.PA/1 regarding agreement No.7 of 1990-91, the same agreement in which vide Ex.PW-2/30 compensation amounting to Rs.4,22,548/- was imposed on the respondent. In award Ex.PA/1 it was the case of the appellants that nothing was due to the respondent , rather a sum of Rs.5,05,435.56/- was recoverable from the respondent and one of the recovery item was penalty (compensation) under Clause 2 amounting to Rs.4,22,548/- On the recovery of Rs.4,22,548/- the arbitrator in award Ex.PA-1 has observed as follows:-

> *"Now coming to penalty under clause 2, this is not arbitrable. However, claimant contractor has challenged this recovery in the Hon'ble High Court of Himachal Pradesh Civil suit No.107/93 and 117/93 and as per interim order dated 23.12.93 (page 7) as under:-*
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> *In case, ultimately it is held that the decision of the Superintending Engineer levying compensation is valid in law, only in that case right can be said to have occurred to the non applicant to recover the amount from the applicant. In that*

eventuality, it will not be open for the Arbitrator to adjudicate upon the same".

Since upto the closing of proceedings, the respondent could not produce any final order of the Hon'ble Court, and as such the recovery at this stage is not allowed".

16. In view of pendency of Civil Suit No.107/93 and 117/93 the Arbitrator did not give his findings regarding the stand of the appellants that an amount of Rs.4,22,548/- was recoverable from the respondent.

17. The Arbitrator in award Ex.PA/1 has recorded specific finding that non handing over of complete site even upto the stipulated date of completion amounts to breach of contract on the part of Executive Engineer. He has also held that drawings were also not made available to the respondent herein as per spirit of agreement. The award Ex.PA/1 was made rule of court by this Court in Civil Suit No.103 of 1996 on 22.10.1997.

18. In judgment dated 22.10.1997 in paragraphs 11,12 and 13 this Court has held as follows:-

"While discussing Claim No.1 in respect of the refund of the security deposit, it has been found by the Arbitrator, on appreciation of evidence, that the delay on the part of claimant occurred on account of late handing over of the site and further delay on the part of the objector in making available drawings and designs. It has also been found that the change was made in the structure of the contract and the payments were not made timely. It has also been observed that there was denial of secured advance as well as delay in issuance of material under clause 43 of the agreement. The site of Block No.1 was given in February, 1991 and the rest in August, 1991. It has also been found that there were trees on the site in Block No.2

which were removed in January, 1992 only and the stumps were removed even when the contract was rescinded. In respect of Block No.3, it has been observed that the site development work started after the work was allotted and the site development was still in progress when the contract was rescinded by the objector.

Interestingly, in respect of Block No.4 it has been found that the site could not be handed over even after the expiry of the stipulated date of the completion or the date of rescinding the work. It has been clearly observed in the award by the Arbitrator that the site was not developed when the work was awarded and it was not handed over to the claimant which prevented him from planning the awarded work. The submissions, thus, being made by Mr. K.D. Sood, learned counsel for the objector, cannot be appreciated that time was the essence of the contract and the work was rescinded on that score. On a reading of clause 2 and clause 5 of the agreement, I find that the time could be extended in certain contingencies and penalties could be imposed for the delay in execution of the job.

It is not, thus difficult to arrive at the finding that it was on account of the act and conduct of the objector that the delay was caused in the completion of the work and it is on that account that there was breach of contract on the part of the objector. Interestingly, at page 6 of the award it has been observed that the objector has not disputed the allegations of the claimant for not handing over complete drawings. It was concluded that there was breach of the contract on the part of the objector and in the sequence of events, an action under clause 3(a) was wholly uncalled for".

The learned Single Judge ultimately dismissed the objections and award was made rule of the court. It is thus clear that delay in execution of the work was not attributable to the respondent, rather it

was attributable to the appellants. The learned District Judge has appreciated the material on record and has rightly come to the conclusion that the delay was due to the appellants and it was not due to the respondent.

19. There is another aspect of the case. As per clause 2 of the agreement Ex.PB Superintending Engineer is the competent authority to levy compensation. The perusal of Ex.PW-2/30 letter dated 17.8.1993 would show that compensation has been imposed by Executive Engineer and not by Superintending Engineer. There is a reference in Ex. PW-2/30 that levy of compensation has been decided by the Superintending Engineer but no such decision has been proved on record. The Executive Engineer under agreement Ex.PB had no jurisdiction to impose compensation, therefore, compensation amounting to Rs.4,22,548/- imposed on respondent vide Ex.PW-2/30 by Executive Engineer is without jurisdiction. The learned District Judge has rightly come to the conclusion that letter Ex.PW-2/30 is without jurisdiction. The appellants have failed to make out any case for interference, the court below has rightly decreed the suit of the respondent by declaring compensation of Rs.4,22,548/- determined and imposed upon the respondent by appellants No.1 and 2 under Clause 2 of the Agreement No.7 of 1990-91 vide letter dated 17.8.1993 Ex.PW-2/30 illegal, null & void, without jurisdiction and restrained appellants No.1 to 3 from realizing the said amount of compensation from the respondent in any manner.

20. The result of above discussion, the appeal is dismissed with no order as to costs.

(Kuldip Singh)
Judge

September 24 , 2007
(sks)